The Ka Wah Bank Ltd v Low Chung Song & Ors

HIGH COURT (KUALA LUMPUR) — SUIT D2-22-207 OF 1987
SELVENTHIRANATHAN J
23 FEBRUARY 1998

Civil Procedure *— Default judgment — Setting aside — Judgment entered in 1988 — Application in 1997 to set aside — Defendants did not comply with O 42 r 13 of the Rules of the High Court 1980 — Whether defendants could invoke O 24 r 17 or O 26 r 9 of the Rules of the High Court 1980 or the court's inherent jurisdiction — Rules of the High Court O 24 r 17 & O 26 r 9*

On 4 May 1988, an order was issued by a judge ('the unless order') directing that unless the defendants complied with a summons for directions order within 30 days, judgment was to be entered. The defendants lodged their answer to the interrogatories on 3 June 1988. No affidavit affirmed by the defendants verifying their list of documents was lodged until 21 March 1997. The plaintiff proceeded to enter judgment on 4 June 1988 in default of compliance by the defendants with the unless order.

By encl 89 dated 22 November 1988, the defendants applied for an extension of one month to file the affidavit verifying the list of documents and for the default judgment to be set aside. The senior assistant registrar ruled that as the unless order had been made by a judge and judgment had been entered against the defendants on their failure to comply with that order, any order to extend time or set aside the judgment in question would also have to be made by a judge. The defendants' solicitors did not take any further action to have encl 89 set down for hearing but instead acquiesced in the subsequent steps taken by the plaintiff's solicitors towards the assessment of damages.

The defendants on 21 March 1997 lodged a fresh application to set aside or vary the unless order and to set aside the default judgment by encl 154, under O 24 r 17 and O 26 r 9 of the Rules of the High Court 1980. The defendants, inter alia, questioned the locus standi of the plaintiff to bring the action in its own name.

Held, dismissing the applications:

(1) There was clear non-compliance by the defendants with O 42 r 13 in relation to encl 154 as the order and judgment in question had been served on their solicitors on 26 October 1988 and they did nothing in the matter after filing encl 89 on 22 November 1988. There was also no sufficient cause being shown for the defendants to successfully invoke in their aid the provisions of O 24 r 17 or O 26 r 9, or the inherent jurisdiction of the court to have the unless order and judgment in question varied or set aside (see pp 393C and 394F).

(2) In order to succeed in their application at encl 154, the defendants must advance cogent prima facie evidence that their defence has merits. This requirement cannot be met by merely seeking the restoration of the defence or by attacking the amended statement of claim, in terms of which judgment had been entered. The present application must inevitably fail where there was no affidavit in support showing a defence on the merits (see p 394G–H).

(3) Estoppel applied to prevent the defendants from raising the issue of locus standi when they should have applied to strike out this action at inception after they were served with process. Moreover, the issue of the locus standi of the plaintiff was raised and decided in 1986 by two courts in Hong Kong and the defendants should not be permitted to reagitate the same issue in this court at this late stage, particularly when the issue was available to be raised as a defence. Therefore, the pleas of res judicata and issue estoppel in the particular circumstances of this case could be invoked (see pp 395G–I and 396A, D).

(4) Furthermore, the defendants' conduct was certainly contumelious. The defendants had not advanced any acceptable reason to clearly demonstrate that there was no intention to ignore or flout the unless order and that the failure to obey was due to extraneous circumstances (see p 398B–F); *Samuels v Linzi Dresses Ltd* [1981] 1 QB 115 and *Re Jokai Tea Holdings Ltd* [1993] 1 All ER 630 distinguished.

[Bahasa Malaysia summary

Pada 4 Mei 1988, satu perintah dikeluarkan oleh seorang hakim ('perintah yang melainkan') yang mengarahkan bahawa melainkan defendan-defendan mematuhi perintah saman untuk arahan dalam tempoh 30 hari, penghakiman hendaklah dimasukkan. Defendan-defendan mengemukakan jawapan mereka kepada interogatori pada 3 Jun 1988. Tiada afidavit yang diikrar oleh defendan-defendan yang menentusahkan senarai dokumen mereka telah dikemukakan sehingga 21 Mac 1997. Plaintif terus memasukkan penghakiman pada 4 Jun 1988 akibat ingkar kepatuhan oleh defendan-defendan dengan perintah yang melainkan.

Melalui lampiran 89 bertarikh 22 November 1988, defendan-defendan memohon untuk perlanjutan masa selama sebulan bagi memfailkan afidavit yang menentusahkan senarai dokumen dan untuk penghakiman ingkar diketepikan. Penolong kanan pendaftar memutuskan bahawa memadangkan perintah yang melainkan telah dibuat oleh hakim dan penghakiman telah dimasukkan terhadap defendan-defendan atas kegagalan mereka untuk mematuhi perintah itu, sebarang perintah untuk melanjutkan masa atau mengetepikan penghakiman berkenaan juga hendaklah dibuat oleh seorang hakim. Peguamcara defendan-defendan tidak mengambil apa-apa tindakan lanjut untuk menetapkan lampiran 89 untuk pembicaraan tetapi

sebaliknya menyetujui langkah-langkah berikutnya yang diambil oleh peguamcara plaintif terhadap taksiran ganti rugi. A

Defendan-defendan pada 21 Mac 1997 mengemukakan permohonan baru untuk mengetepikan atau mengubah perintah yang melainkan dan untuk mengetepikan penghakiman ingkar melalui lampiran 154, di bawah A 24 k 17 dan A 26 k 9 Kaedah-Kaedah Mahkamah Tinggi 1980. Defendan-defendan, antara lain, mempersoalkan locus standi plaintif untuk membawa tindakan atas namanya sendiri. B

Diputuskan, menolak permohonan-permohonan: C

(1) Terdapat ketidakpatuhan oleh defendan-defendan dengan A 42 k 13 berhubung dengan lampiran 154 kerana perintah dan penghakiman berkenaan telah disampaikan kepada peguamcara mereka pada 26 Oktober 1988 dan mereka tidak berbuat apa-apa dalam perkara itu selepas memfailkan lampiran 89 pada 22 November 1988. Kausa yang memadai juga tidak ditunjukkan D untuk defendan-defendan menggunakan peruntukan A 24 k 17 atau A 26 k 9 bagi membantu mereka, atau bidang kuasa sedia ada mahkamah untuk mengubah atau mengetepikan perintah yang melainkan dan penghakiman berkenaan (lihat ms 393C dan 394F). E

(2) Untuk berjaya dalam permohonan mereka di lampiran 154, defendan-defendan mestilah mengemukakan keterangan prima facie yang lebih awal dan meyakinkan bahawa pembelaan mereka mempunyai merit. Keperluan ini tidak boleh dipenuhi dengan cuma meminta pengembalian pembelaan atau dengan menyerang pernyataan tuntutan terpinda, dalam mana penghakiman telah F dimasukkan. Permohonan ini mestilah gagal di mana tiada afidavit sokongan yang menunjukkan pembelaan atas merit (lihat ms 394G–H).

(3) Estopel terpakai untuk menghalang defendan-defendan daripada membangkitkan isu locus standi walhal mereka sepatutnya G memohon untuk membatalkan tindakan pada permulaan selepas disampaikan dengan proses. Tambahan pula, isu locus standi plaintif dibangktikan dan diputuskan pada tahun 1986 oleh dua buah mahkamah di Hong Kong dan defendan-defendan tidak patut dibenarkan membangkitkan semula isu yang sama di mahkamah ini pada peringkat yang lewat ini, terutamanya apabila H isu boleh didapati untuk ditimbulkan sebagai pembelaan. Maka, hujah-hujah res judicata dan isu estopel dalam keadaan tertentu kes ini boleh digunakan (lihat ms 395G–I dan 396A, D).

(4) Tambahan pula, kelakuan defendan-defendan memang keterlaluan. Defendan-defendan tidak mengemukakan sebarang I alasan yang boleh diterima untuk menunjukkan secara jelas bahawa tiada niat untuk mengabai atau melanggar perintah yang melainkan dan bahawa kegagalan untuk patuh adalah disebabkan

keadaan dari luar (lihat ms 398B–F); *Samuels v Linzi Dresses Ltd* [1981] 1 QB 115 dan *Re Jokai Tea Holdings Ltd* [1993] 1 All ER 630 dibeza.]

Notes

For cases on setting aside default judgment, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1547–1555.

Cases referred to

Bank of Austra.asia v Nias, The (1851) 16 QB 717 (refd)
Carl Zeiss Stiftung v Rayner & Keeler Ltd & Ors (No 2) [1967] 1 AC 853 (refd)
Castrique v Imrie & Anor [1861–73] All ER Rep 508 (refd)
Dallal v Bank Mellat [1986] 1 All ER 239 (refd)
Danish Mercantile Co Ltd & Ors v Beaumont & Anor [1951] 1 Ch 680 (refd)
European Gateway, The [1987] 1 QB 206 (refd)
Grand Metropolitan Nominee (No 2) Co Ltd v Evans [1993] 1 All ER 642 (refd)
Henderson v Henderson [1843–60] All ER Rep 378 (refd)
Hitachi Sales (UK) Ltd v Mitsui OSK Lines Ltd [1986] 2 Lloyd's Rep 574 (refd)
Hunter v Chief Constable of the West Midlands Police & Ors [1982] AC 529 (refd)
Jocelyne, The [1984] 2 Lloyd's Rep 569 (refd)
John Walker & Sons Ltd & Ors v Henry Ost & Co Ltd & Anor [1970] 2 All ER 106 (refd)
Jokai Tea Holdings Ltd, Re [1993] 1 All ER 630 (distd)
Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 (refd)
LY Swee & Co Ltd; Khoo Leong Kee v LY Swee & Co Ltd, Re [1968] 2 MLJ 104 (refd)
Marshall's Valve Gear Co Ltd v Manning, Wardle & Co Ltd [1909] 1 Ch 267 (refd)
Midland Bank Trust Co Ltd & Anor v Green & Ors (No 2) [1979] 1 All ER 726 (refd)
OCBC Bank (M) Bhd v Kredin Sdn Bhd [1997] 2 MLJ 544 (refd)
Pemberton v Hughes [1899] 1 Ch 781 (refd)
Rosario Messina v Eustachio P Petrococchino (1872) LR 4 PC 144 (refd)
Samuels v Linzi Dresses Ltd [1981] 1 QB 115 (distd)
Sarawak Building Supplies Sdn Bhd v Director of Forests & Ors [1991] 1 MLJ 211 (refd)
Sennar, The (No 2) [1985] 1 WLR 490 (refd)
Southern Finance Co Bhd v Lee Geok Lin [1991] 1 CLJ 576 (refd)
Superintendent of Pudu Prison & Ors v Sim Kie Chon [1986] 1 MLJ 494 (refd)

Syawal Enterprise Sdn Bhd & Anor v Dayadiri Sdn Bhd [1990] 3 MLJ 239 (refd) A

Wallersteiner v Moir [1974] 3 All ER 217 (refd)

Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor [1975] AC 581 (refd)

B

Legislation referred to

Rules of the High Court 1980 O 24 r 17, O 26 r 9, O 42 r 13

Ira Biswas (*Ajit Kumar Hastir* with her) (*Chooi & Co*) for the plaintiff.

M David Morais (*Gopal Sreenevasan* with him) (*Sivananthan*) for the defendants. C

Selventhiranathan J: By encl 154 filed on 21 March 1997, the first and second defendants ('the defendants') applied under O 24 r 17 and O 26 r 9 of the Rules of the High Court 1980, and under the inherent jurisdiction of the court, for an order, inter alia, as follows: D

(1) that the order (of court) dated 4 May 1988 be set aside or varied to the extent that there be an abridgement [sic] of time for the filing of the answer to the interrogatories and the affidavit verifying [the] list of documents as may be appropriate;

(2) that the defence of the first and second defendants be restored; E

(3) that the judgment entered on 4 June 1988 (in default of compliance with an order of court dated 4 May 1988) be set aside.

In this judgment, the application by the defendants for 'abridgement of time' referred to above will be read as 'enlargement of time' as that is clearly what was meant and intended although counsel on both sides did not seem to appreciate the difference, as was obvious from their respective submissions. Further, all references to a numbered order and rule hereinafter shall mean that order and rule as they appear in the Rules of the High Court 1980. F

On 4 May 1988, an order was issued by a judge ('the unless order') directing that unless the defendants complied with a summons for directions order dated 11 February 1988 within 30 days from 4 May 1988, judgment was to be entered as prayed for in the amended statement of claim against them. G

The order of 11 February 1988 was the usual order made on a summons for directions directing the filing of the list of documents and of the affidavit verifying the same and granting the plaintiff leave to serve interrogatories and directing the defendants to answer the same. H

The defendants lodged their purported answer to the interrogatories on 3 June 1988. No affidavit affirmed by the defendants verifying their list of documents was lodged until 21 March 1997. I

The plaintiff proceeded to enter judgment on 4 June 1988 in default of compliance by the defendants with the unless order of 4 May 1988.

By encl 89 dated 22 November 1988, the defendants applied for orders for extension of time of one month to file the affidavit verifying the list of documents and for the default judgment to be set aside. That application was never proceeded with. The minutes in the file show that encl 89 came up before the then senior assistant registrar of this court on 14 March 1989 in the presence of counsel for the parties. The senior assistant registrar then made the following notation:

> Enclosure 89 to be heard by learned judge in chambers. (Indecipherable) to write in for a date.

The senior assistant registrar so ruled, correctly, as the unless order had been made by a judge and judgment had been entered against the defendants on their failure to comply with that order, and any order to extend time or set aside the judgment in question would, in the circumstances, also have to be made by a judge. However, what is important for the present purpose is that the defendants' solicitors did not take any further action to have encl 89 set down for hearing but instead acquiesced in the subsequent steps taken by the plaintiff's solicitors towards the assessment of damages, as will be apparent further down in this judgment.

The plaintiff proceeded to apply for dates to be fixed for the assessment of damages against the defendants to which the second defendant's then solicitors, Messrs Tengku Mohamed Achan & Lim, in fact consented. The plaintiff had then proceeded on 14 February 1990 to set the action down for trial on the issue of liability and damages against the seventh defendant.

The defendants then on 21 March 1997 lodged a fresh application to set aside or vary the unless order and to set aside the default judgment by their summons in chambers in encl 154 as elaborated above, without doing anything about their earlier similar application in encl 89.

It was submitted for the defendants in relation to encl 154 that the court reserves a discretion to set aside the default judgment and to restore the defence on the basis of O 24 r 17 and O 26 r 9, and the commentary thereon on *The Supreme Court Practice* 1995, and the case of *Samuels v Linzi Dresses Ltd* [1981] 1 QB 115. Therefore, for the reasons set out in the affidavits of the defendants, the discretion either to set aside the default judgment or to enlarge time to lodge the affidavit of documents (if required) ought properly to be exercised in favour of the defendants. The cases of *Grand Metropolitan Nominee (No 2) Co Ltd v Evans* [1993] 1 All ER 642; *Re Jokai Tea Holdings Ltd* [1993] 1 All ER 630; and *John Walker & Sons Limited & Ors v Henry Ost & Co Ltd & Anor* [1970] 2 All ER 106 were cited in support of this contention.

It was contended for the defendants that, in any event, the default judgment was bad in that it was granted in default on an action founded on, inter alia, fraud and breaches of fiduciary duties. Further, the default judgment failed to particularize the judgment entered against the defendants and in this respect it was also bad. Reference was made to *Wallersteiner v Moir* [1974] 3 All ER 217 and *Gabriel v Bailey & Ors* (unreported judgment dated 27 June 1996 of the United Kingdom Court of Appeal (Civil Division)) in support.

A further attack was mounted in the defendants' contention that the solicitors for the plaintiff in this action had and have no warrant or no adequate warrant to act and that consequently, all their acts from the filing of the writ up to the present time were and are null and void. This was because the right to bring this action had become vested in the Government of Hong Kong when it took over the plaintiff bank and accordingly, the latter could not authorize solicitors to act on its behalf. Reference was made to *Palmer's Company Law* (Vol 2) at p 8175; *Sarawak Building Supplies Sdn Bhd v Director of Forests & Ors* [1991] 1 MLJ 211; *Syawal Enterprise Sdn Bhd & Anor v Dayadiri Sdn Bhd* [1990] 3 MLJ 239; *Re LY Swee & Co Ltd; Khoo Leong Kee v LY Swee & Co Ltd* [1968] 2 MLJ 104; *Danish Mercantile Co Ltd & Ors v Beaumont & Anor* [1951] 1 Ch 680; and *Marshall's Valve Gear Co Ltd v Manning, Wardle & Co Ltd* [1909] 1 Ch 267 in support of this ground of attack.

It was thus contended that the right to prosecute this action vested and vests in the Government of Hong Kong only and, as such, the plaintiff had and 'has no locus (sic) in which to bring this action'.

For these reasons, it was submitted on behalf of the defendants, there should be orders in terms of their application.

In response, it was argued for the plaintiff that the default judgment entered on 4 June 1988 was and is valid as it was made upon the defendants' failure to comply with the unless order of 4 May 1988. In the first place, there was no answer to the plaintiff's interrogatories. The document purporting to be the answer to the interrogatories which was served on the plaintiff on 3 June 1988 did not comply with O 26 r 1(6) as it was not sworn before a commissioner for oaths and neither did it have the date nor place of swearing. By applying for enlargement of time in encl 154 to file the answer, the defendants were admitting that they had not filed the same earlier, despite claiming otherwise. Secondly, the defendants had further admitted that they had documents in their possession by their solicitor affirming on oath in her affidavit of 3 May 1988 that the defendants did not have *all* (emphasized) the documents, thereby implying that they had some documents.

It was also submitted for the plaintiff that there is no authority to state that judgment for failure to comply with an unless order cannot be entered for breach of fiduciary duties or fraud, and that the cases of *Wallersteiner* and *Gabriel* cited on behalf of the defendants were not authority for such a proposition.

It was also submitted for the plaintiff that the court has no jurisdiction under O 24 r 17 or O 26 r 9, or under its inherent jurisdiction, to revoke or set aside an order made under O 24 or O 26 once judgment has been entered. The case of *Midland Bank Trust Co Ltd & Anor v Green & Ors (No 2)* [1979] 1 All ER 726 was cited in support thereof.

It was further submitted that the unless order was made inter partes upon the plaintiff's application for judgment and the defendants' application for extension of time, and after full argument from both parties. If the defendants had been dissatisfied with the unless order that was made, the

A only recourse available to them was to have appealed then, which they did not do. It was therefore not open for them to apply to set aside or vary the order and judgment now because the latter was not a 'default judgment' but a judgment entered pursuant to an inter partes order. Hence, it was argued, a judgment cannot be set aside simply on the grounds that a defendant wants a further opportunity to comply with an unless order B which specified the time within which there was to have been compliance. The case of *Hitachi Sales (UK) Ltd v Mitsui OSK Lines Ltd* [1986] 2 Lloyd's Rep 574 was cited in support.

According to the plaintiff, all the cases cited by the defendants were cases where no judgment had been entered, and therefore, further time C was given upon satisfactory explanation being proferred for failure to comply with orders made. Those cases were inapplicable to the facts of the present case.

The plaintiff contended that, in any event, there was no good reason why the defendants should be given time now to comply with the unless D order and have the judgment set aside as they had not explained the delay for doing so satisfactorily, and that a defendant must act quickly if he sought the intervention of the court in a matter that affected his rights. Reference was made to *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396 in support of this proposition.

E It was further argued that the defendants are also estopped from making this application by the conduct of their previous solicitors, Messrs Tengku Mohamed Achan & Lim, in electing to proceed with the assessment of damages instead of their application in encl 89 to set aside the default judgment. On the basis of this, the plaintiff had applied for the case against the seventh defendant to proceed to trial for the determination of liability F before proceeding to the assessment of damages against him, and the plaintiff had applied separately for damages against the defendants to be assessed. Further, judgment had been entered as prayed for in the amended statement of claim which contained all particulars of the plaintiff's claim and there was therefore no prejudice to the defendants.

G On the defendants' contention that the plaintiff's solicitors, Messrs Chooi & Co, had and have no warrant or no adequate warrant to act for the plaintiff and that consequently all acts from the filing of the writ to date are null and void and the right to prosecute this action rests not in the plaintiff bank but in the Government of Hong Kong as a result of its having been taken over by the latter, and that, as such, the plaintiff has no H locus standi to bring this action, the plaintiff replied that it had and has the right to do so and that the defendants are barred by the application of the doctrine of res judicata from raising this issue when they had been represented in the proceedings, and had filed and argued applications therein, and had had judgment entered against them.

I It was submitted for the plaintiff that parties are required to bring their whole case forward and are barred from later raising matters that might have been brought forward previously as the plea of *res judicata* applies to every point which properly belonged to the subject of the litigation. In

support, the cases of *Henderson v Henderson* [1843–60] All ER Rep 378; *OCBC Bank (M) Bhd v Kredin Sdn Bhd* [1997] 2 MLJ 544; *Southern Finance CoBhd v Lee Geok Lin* [1991] 1 CLJ 576; and *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581 were cited.

It was further argued that the defendants were also barred by the doctrines of res judicata and issue estoppel from raising this issue because, by virtue of a foreign judgment, the very issue that was now being raised had been raised before and had been dismissed by the Supreme Court (the equivalent of a High Court in Malaysia) and the Court of Appeal of Hong Kong in Suit A4191 of 1987. Reference was made to the cases of *The Sennar (No 2)* [1985] 1 WLR 490; *The European Gateway* [1987] 1 QB 206; *Carl Zeiss Stiftung v Rayner & Keeler Ltd & Ors (No 2)* [1967] 1 AC 853; *The 'Jocelyne'* [1984] 2 Lloyd's Rep 569; *Dallal v Bank Mellat* [1986] 1 All ER 239; *Castrique v Imrie & Anor* [1861–73] All ER Rep 508; *Rosario Messina v Eustachio P Petrococchino* (1872) LR 4 PC 144; *Pemberton v Hughes* [1899] 1 Ch 781; and *The Bank of Australasia v Nias* (1851) 16 QB 717, which were relied upon in support.

It was also submitted that the authority of Messrs Chooi & Co to act for the plaintiff could not be questioned in the light of the firm being instructed by properly authorized officers of the plaintiff, as confirmed by the plaintiff, and by the plaintiff paying the bills of Messrs Chooi & Co, as evidenced by the plaintiff's affidavits and the documents exhibited therein.

In the circumstances, it was submitted that Messrs Chooi & Co were and are properly authorized to act for the plaintiff in this action.

To my mind, the biggest hurdle that the defendants faced in order to succeed in their application in encl 154 was to explain their failure in proceeding with encl 89 after having filed the same some eight years ago. Encik David Morais who appeared for the defendants, when asked, was at a loss to say why encl 89 was never proceeded with. In the circumstances, it can only be assumed that encl 89 was abandoned.

The application in encl 154, which was filed for the same purpose as encl 89, was made more than eight years later. By way of explanation for the delay of more than eight years in filing encl 154, the second defendant averred that between June 1987 and September 1993, he was detained by the authorities either in Hong Kong or in Singapore and held incommunicado which prevented him from conducting an effective defence of this action. As for the first defendant, the second defendant stated that the former had been in the Republic of China since 1988 and was unable to travel outside 'until arrangements are concluded with the authorities of Hong Kong and Singapore as to whether they intend to pursue criminal charges against him'.

As the second defendant affirmed the affidavit in support of encl 154 on behalf of the first defendant as well as himself, it was incumbent upon him to explain why he took no steps to have encl 89 heard after September 1993 (when he ceased being held incommunicado, as he put it) or why he waited until 21 March 1997 to have encl 154 filed while encl 89 was still ostensibly awaiting hearing. This he failed to do and the court was not in

A a position to grant the defendants any indulgence having regard to O 42 r 13 which came into force on 1 August 1993 vide PU(A) 192/93 and which reads as follows:

> Where in these Rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order
B or judgment must make his application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

There was clear non-compliance by the defendants with this rule in relation to encl 154 as the order and judgment in question had been served
C on their solicitors on 26 October 1988 and they did nothing in the matter after filing encl 89 on 22 November 1988. Merely filing the application in encl 89 did not absolve the defendants from responsibility for vigorously pursuing it, particularly after the introduction of r 13 of O 42 adverted to above, which imposed a specific time frame for making applications to set aside or vary orders or judgments of the court.

D In this context, it would not be inapt to quote from the judgment of Gopal Sri Ram JCA in *Khor Cheng Wah* where, speaking for the Court of Appeal, he had this to say at pp 401–402 of the report of that case:

> The delay point
>
> E It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus, non dormientibus, jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae*, a court may refuse relief to an indolent litigant.
>
> F In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to tender a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the judge in whom the law primarily vests the discretion.
>
> G The point that is presently under consideration has been authoritatively stated in *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241 at p 247; [1996] 1 AMR 215. It is a decision of the Federal Court and therefore quite plainly binds this court. There, Edgar Joseph Jr FCJ said (at p 225):
>
> > 'The general rule is that when it is clearly demonstrated to the satisfaction
> H of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justiciae*, that is to say, irrespective of the merits and without terms. Having said that it should be added that the application to set aside such a judgment should be made:
> >
> > I (a) with reasonable promptitude, in other words within a reasonable time and
> >
> > (b) before the defendant has taken any fresh step after becoming aware of the irregularity. (See O 2 r 2(i) of the Rules of the High Court 1980.)'

In the present case, the explanation of the fourth defendant for the delay in making his explanation [misprint for 'application' I believe] is, to summarize his affidavits, that he placed the conduct of his defence in the hands of a solicitor who did little to protect his client's interests. A

Is that a reasonable explanation? The learned judge did not think it was. And I agree with him. Undoubtedly, this court will not, whenever feasible, allow a client to suffer for the negligence of his solicitor: see *Cheow Chew Khoon v Abdul Johari bin Abdul Rahman* [1995] 4 CLJ 127 at p 152; [1995] 1 MLJ 457 at p 490, per VC George JCA. B

But there are limits to what may be done in the interests of justice. After all, justice is not only for a defaulting defendant: it is for the plaintiff as well. And at the end of the day, a careful examination of the facts and circumstances reveals that the fourth defendant did nothing to communicate with his solicitor at any earlier point in time to discover the state in which the litigation against him stood. Surely, it would be injustice to visit the consequences of his indifference upon the plaintiff's head. C

In *Khor Cheng Wah*, judgment in default of defence was entered on 9 March 1988. On 10 March 1994, the plaintiff took out a summons to amend the default judgment entered on 9 March 1988 by substituting a lower rate of interest for that awarded. It was only after he was served with this application to amend the default judgment that the defendant applied on 5 April 1994 to set aside the judgment. D

In the present case, although the defendants applied on 22 November 1988 by encl 89 to set aside the unless order and judgment in question, neither they nor their solicitors did anything to pursue the matter and instead abandoned it and more than eight years later attempted to resuscitate it through the present application in encl 154. To my mind, this certainly could not amount to sufficient cause being shown for the defendants to successfully invoke in their aid the provisions of O 24 r 17 or O 26 r 9, or the inherent jurisdiction of the court to have the unless order and judgment in question varied or set aside. E F

Counsel for the plaintiff appears to have overlooked a further vital requirement that the defendants must satisfy in order to succeed in their application at encl 154, besides satisfactorily explaining their inordinate delay in making the said application. They have to at the same time advance cogent prima facie evidence that their defence has merits. There is a singular paucity of any such evidence in their affidavits in support. This requirement cannot be met by merely seeking the restoration of the defence or by attacking the amended statement of claim, in terms of which judgment had been entered. There is a whole catenation of authorities specifying that an application, such as the present one, must inevitably fail where there is no affidavit in support showing a defence on the merits. G H

Useful reference may be made to 2 *Mallal's Digest* (4th Ed) for cases dealing with such applications. For a United Kingdom case on point, the defendants' cited authority, *Wallersteiner*, dealt with the setting aside of a judgment in default in the following terms in the language of Lord Denning MR at p 232 of the report of that case: I

Judgment in default

I turn to the counterclaim. At the time when Mr Moir took out his summons for judgment, Dr Wallersteiner was plainly in default. Twelve months had passed. He had not served any defence to the counterclaim. According to RSC Ord 19 r 7(1), 'on the hearing of the application the court shall give such judgment as the plaintiff appears entitled to on his statement of claim'. Likewise with a counterclaim: see RSC Ord 19 r 8.

Although the word 'shall' is used in that rule, it is clear from the authorities that it is not imperative but directory. The court will not enter a judgment which it would afterwards set aside on proper grounds being shown: see *Graves v Terry* (1882) 9 QBD 170; *Gibbings v Strong* (1884) 26 Ch D 66. A judge in chambers has a discretion which he will exercise on the same lines as he will set aside a judgment in default. He will require the party to show that he has a good defence on the merits. This is a time-hallowed phrase going back for a hundred years: see *Watt v Barnett* (1878) 3 QBD 363; *Farden v Richter* (1889) 23 QBD 124 at p 130. It has been explained by Lord Atkin as meaning that the applicant would produce to the court evidence that he has a prima facie defence (see *Evans v Bartlam* [1937] 2 All ER 646 at p 650, (1937) AC 473 at p 480). The applicant must produce evidence by affidavit showing that he has such a defence. The judge will also himself require the party in default to pay the costs occasioned by his default. But ultimately it is for the discretion of the judge — a discretion, be it noted, which will be reviewed in this court, if need be.

As will become apparent at a further stage of this judgment, the defendants in the present case did not show they had a good defence on the merits by producing to the court evidence that they have, in the words of Lord Atkin cited with approval by Lord Denning MR above, 'a prima facie defence'. The attack that they levelled at the judgment, that it had been obtained in the alternative as pleaded, cannot be sustained when the facts supporting the heads of claims in the alternative are the same. No prejudice was therefore caused to the defendants when judgment was entered in these circumstances.

In relation to the contention of the defendants that the plaintiff had no locus standi to bring this action, I was of the view that estoppel applied to prevent them at this late stage from raising this issue when they should have, if they were indeed serious in their contention, applied to strike out this action at inception after they were served with process herein. However, having recognized the locus standi of the plaintiff to bring this action by submitting to the jurisdiction of this court, and having participated in its proceedings without reservation up to this stage, the defendants cannot now be heard to question the standing or right of the plaintiff to do so as the existence of that standing or right was a necessary pre-condition to clothe the plaintiff with the wherewithal to commence proceedings against the defendants in the first instance.

The fact that the very issue of the locus standi of the plaintiff to bring an action in its own name was raised and decided in 1986 by two courts of competent jurisdiction in proceedings in Hong Kong between the plaintiff, on the one hand, and the defendants and other persons, on the other, militates against the defendants being permitted to reagitate the

same issue in this court at this late stage and about 10 years after this action was filed, particularly when the issue was available to be raised as a defence and known to the defendants when the action was commenced. If the defendants were allowed to do this now, it would make a mockery of the law and result in injustice as a plea that any new action brought by the Government of Hong Kong is time-barred under the Limitation Act 1953 is bound to be raised by the first and second defendants and, most probably, by the other defendants as well.

In fact, a challenge to the jurisdiction of this court to be seized of this action was pleaded in the defence that was filed and it should have been raised by the defendants as a preliminary issue to be tried separately pursuant to O 33 r 5 as it would have rendered the trial of this action itself unnecessary, in the event the defendants were able to sustain their stance. However, that was never done or even attempted to be done.

It is, therefore, my view that the wider application of the pleas of res judicata and issue estoppel in the particular circumstances of this case could, quite correctly, be invoked.

In the case of *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494, the late Abdoolcader SCJ, speaking for the then Supreme Court, had this to say in relation to the raising of the pleas of res judicata and estoppel *per rem judicatum* at pp 498–499 of the report of that case:

> The earlier action instituted by the respondent on 2 July 1985 and which was struck out sought relief on the ground of discrimination in breach of art 8 of the Constitution but in the present proceedings the grounds for relief have been augmented and declarations sought to the effect we have indicated earlier. The appellants plead res judicata in this regard and we think the point is well taken and is supported by authority, and we would refer to the pronouncement of the Privy Council in *Hoystead & Ors v Commissioner of Taxation* [1926] AC 155 (at pp 165–166) and a catenation of cases to the like effect, namely, that the plea of res judicata applies, except perhaps where special circumstances may conceivably arise of sufficient merit to exclude its operation, *not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.* (Emphasis added.)
>
> There is moreover the inherent jurisdiction of the court in cases where *res judicata* is not strictly established, and where estoppel *per rem judicatam* has not been sufficiently pleaded, or made out, but nevertheless the circumstances are such as to render any reagitation of the questions formally adjudicated upon a scandal and an abuse, the court will not hesitate to dismiss the action, or stay proceedings therein, or strike out the defence thereto, as the case may require. It would suffice in this regard to refer to the judgment of the Privy Council delivered by Lord Wilberforce in *Brisbane City Council and Myer Shopping Centres Pty Ltd v Attorney-General for Queensland* [1979] AC 411 (at p 425):
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> > 'The second defence is one of *res judicata*. There has, of course, been no actual decision in litigation between these parties as to the issue

involved in the present case, but the appellants invokve this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wilgram V-C in *Henderson v Henderson* (1843) 3 Hare 100 and its existence has been reaffirmed by this Board in *Hoystead v Commissioner of Taxation* [1926] AC 155. A recent application of it is to be found in the decision of the Board in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581. It was, in the judgment of the Board, there described in these words (at p 590):

> "... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings."'

The attempt by way of the instant proceedings to relitigate and reopen the earlier action clearly reflects the appositeness of the caption suggested for this matter in the prelude to this judgment and would appear to us to be as clear an instance of an abuse of the process of the court as one can find within the connotation thereof enunciated in the speech of Lord Diplock in *Hunter v Chief Constable of the West Midlands Police & Ors* [1982] AC 529 (at p 542).

When the defendants took further steps in the proceedings after filing the defence without reserving their right to challenge the jurisdiction of this court in the matter, estoppel effectively applied to prevent them from raising this challenge, or any other muted challenge akin to this, for instance, the locus standi of the plaintiff to bring this action or the authority to act of Messrs Chooi & Co subsequently.

However, the foregoing notwithstanding, cl 6 of the deed dated 22 March 1986 entered into between the Government of Hong Kong and the China International Trust and Investment Corp in relation to the affairs of the plaintiff being taken over by them clearly provides for proceedings to be brought in the name of the plaintiff or its relevant subsidiary, and this effectively renders the challenge to the locus standi of the plaintiff to institute this action a non-issue. Ergo, the challenge to the authority of Messrs Chooi & Co to act for the plaintiff in these proceedings also flies out the window.

Apart from the question of inordinate delay on the part of the defendants in making the application in encl 154, the court also found itself in general agreement with the submissions made by counsel for the plaintiff in respect of the other matters adverted to, and unable therefore to agree with the submissions made by counsel for the defendants in respect of the same as the cases cited on the defendants' behalf were either distinguishable on the facts or not applicable to the present case.

In *Samuels v Linzi Dresses Ltd* [1981] 1 QB 115, the further and better particulars in question were served three days after the date specified in the order for compliance which is in stark contrast to the almost nine-year timeframe the defendants granted themselves. The factual background of that case is poles apart from that of the present case.

The case of *Grand Metropolitan Nominee (No 2) Co Ltd v Evans* [1993] 1 All ER 642 in fact is in favour of the plaintiff as it is authority for the proposition that the court will strike out a pleading for failure to comply with an order to serve further and better particulars of that pleading within a specified time if the conduct of the party whose pleading is to be struck out is contumelious. In the present case, the defendants' conduct was certainly contumelious, having regard to the facts. The defendants could also not rely on *Re Jokai Tea Holdings Ltd* [1993] 1 All ER 630 on account of their conduct.

In *Grand Metropolitan Nominee (No 2) Co Ltd*, the United Kingdom Court of Appeal, speaking through Purchas LJ, adopted with emphatic approval the test laid down in *Re Jokai Tea Holdings Ltd* in the following passage at p 649 of the report:

> After very careful review of the authorities, Sir Nicolas Browne-Wilkinson V-C expressed this view, with which I respectfully and wholeheartedly agree (ie in *Re Jokai Tea Holdings Ltd* [1993] 1 All ER 630; [1992] 1 WLR 1196 at p 1203):
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> > 'In my judgment, in cases in which the court has to decide what are the consequences of a failure to comply with an unless order, the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But if a party can clearly demonstate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed.'

In the present case, the defendants have not advanced any acceptable reason to 'clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances' in relation to the unless order of 4 May 1988. By the second defendant's own assertion, he ceased being held incommunicado in September 1993. The fact that he did nothing after this until 21 March 1997 when the defendants' application in encl 154 was filed brings the court to the inescapable conclusion that the unless order was intentionally ignored or flouted as the extraneous circumstances which could possibly have been advanced on his behalf (ie being held incommunicado) ceased to inure after September 1993.

The case of *Wallersteiner*, upon which reliance was placed by the defendants, does not help them. The action there was struck out because there was excessive delay on the part of the plaintiff, who was the defendant in the counterclaim, in prosecuting the claim. A repetition of the facts in the language of Lord Denning MR at pp 231–232 of the report of that case will drive home their similarities with those of the present case in relation to the failure of the defendants to proceed with encl 89 after filing it in 1988 and then waiting for almost nine years to file a fresh application for the same relief vide encl 154:

Striking out the libel claim

Since *Allen v McAlpine* [1968] 1 All ER 543, [1968] 2 QB 229 this court has repeatedly struck out actions when there has been excessive delay. In many of these cases the plaintiff's solicitor has been at fault. He has not observed the time-table laid down by the rules of the court. He has been guilty of inordinate and inexcusable delay. It has prejudiced the fair trial of the action. So, on the defendant's application, the action has been struck out. The plaintiff has been left to his own remedy for negligence against his own solicitor.

The present case is different. It is not the solicitor who has been at fault. It is the plaintiff himself, Dr Wallersteiner. He has made default time after time. He failed to give proper discovery. He failed to deliver proper defence. He failed to set the action down for trial. It is obvious that he was not at all keen that the action should come to trial. It would suit him well if it dragged on for ever. So long as he could prolong the proceedings he could always say — as he so often did — 'These matters are sub judice, so they cannot be discussed'. All things considered, it must have been plain to Dr Wallersteiner that his best strategy was to conduct this action as if it were a war of attrition. If he fought it long enough, he might be able to break Mr Moir's nerve, exhaust his limited resources, make him give up trying, so that the case would never come to trial. By this means the public would never get to know the truth. His misdeeds would never come up to receive their just penalty.

Such was, I believe, the state of mind of Dr Wallersteiner. He would not, of course, confess it. But his whole conduct throughout these proceedings warrants the inference. To my mind his action was an abuse of the process of the court. His defaults in the course of the proceedings were all of a pattern. They were 'intentional and contumelious', to use Diplock LJ's words in *Allen v McAlpine* [1968] 1 All ER 556, [1968] 2 QB 259. Dr Wallersteiner was using the process of the court — not to get justice — but to thwart it. When the court meets with such abuse, it has means to cope with it. It will strike out the action which he has brought; and it will give such judgment as the nature of the case permits.

I would add this. Even if his conduct were not to be castigated as an abuse of the process, nevertheless the delays for which he was responsible were inordinate and inexcusable and were such as seriously to prejudice the course of justice. It prejudiced not only Mr Moir in a fair trial. It also prejudiced the other shareholders and the public at large. All of us have an interest in seeing that justice is done. And in bringing wrongdoers to book. Dr Wallersteiner started the action in April 1967. Now seven years later he still has not delivered any acceptable pleading. Meanwhile some witnesses of critical importance have died. Notably Mr Dalgleish and Miss Rumbell. I know that there was a long period when Mr Moir did not deliver some particulars. But that was not nearly so reprehendible as the delay of Dr Wallersteiner. The judge found Dr Wallersteiner's delay were inexcusable. I agree with him. The judge put it well when he said:

> 'These proceedings affect the affairs of pubic companies. It is clear from responsible publications that have been put before us that what has been going on, and the disarray in which the various companies find themselves, is little short of a public scandal .... There are wider issues involved. The law is brought into disrepute by such delay; and the plaintiff on the counterclaim, Mr Moir, in this case, may be driven

> by exasperation or by lack of funds, or indeed by personal considerations, to cease to press what might very well be a proper claim. That is a form of prejudice which, because it is insidious, is no less damaging to justice than delays which simply destroy the memory of witnesses.'
>
> I agree. The defaults of Dr Wallersteiner were so serious that his claim for libel must be struck out.

One must not lose sight of the fact that Dr Wallersteiner was the defendant in the counterclaim there.

Similarly, in the present case, the plaintiff is a public company incorporated in Hong Kong, engaged in the business of banking as a licensed commercial bank. At all material times the first defendant was the president and chief executive officer of the plaintiff while the second defendant was one of its executive vice-presidents and executive directors. The claim of the plaintiff against the defendants (and also other defendants who were directors of the plaintiff) was founded upon:

(a) breach of fiduciary duties;

(b) alternatively, negligence;

(c) alternatively, breach of duty of care, all of which were particularized in the amended statement of claim.

The defendants in their defence merely denied the comprehensive allegation of facts particularized in the amended statement of claim and put the plaintiff to strict proof thereof. They contended in their defence that 'any act of theirs in the course of the execution of their duties for the plaintiff was carried out on the basis of banking rules as had been outlined to them by the plaintiff' without condescending to particulars.

Although the defence ran to 68 paragraphs on 14 typewritten pages, it can immediately be seen that its length was occasioned by its referring to paragraphs in the amended statement of claim, collectively or individually, and then denying the same and putting the plaintiff to strict proof thereof. Apart from this, the defendants raised the issue of the jurisdiction of this court to be possessed of the action. They also averred only that 'they were acting honestly and had reasonable ground to believe and did believe that they acted prudently and skilfully and in the best interest of the plaintiff and in the ordinary course of banking practice' in reply to the very detailed allegations of breach of fiduciary duties, or breach of duty of care, or negligence, pleaded on the claim. Again, the defendants failed to plead any particulars of their acts which would, at least, attempt to meet the plaintiff's allegations.

To my mind, the defence could have been reduced in essence to a single page of three paragraphs to contain the following ingredients:

(a) a challenge to the jurisdiction of this court;

(b) a total denial or lack of knowledge of all the plaintiff's detailed allegations against the defendants contained in 74 closely typewritten pages numbering 73 paragraphs in all, and putting the plaintiff to strict proof of its pleadings in toto (except for the admitted formalities);

A and

(c) a general statement that the defendants acted honestly, skilfully and prudently upon reasonable ground in the best interest of the plaintiff and upon the basis of the plaintiff's banking rules.

B Against this backdrop of the facts as disclosed in the pleadings and the time over which the defendants have taken steps to protect their conceived rights or interests, one can only conclude, inescapably at that, that the acts of the defendants, like those of Dr Wallersteiner, were an abuse of the process of the court; that their defaults in the course of the proceedings were all of a pattern, intentional and contumelious; and that they were C using the process of the court not to get justice but to thwart it. In the face of such a situation, the court would be abdicating its duty and function if it allowed its coercive power to be abused in the manner sought by allowing the unmeritorious and self-serving application of these indolent defendants to stand.

D The court accordingly dismissed encl 154 with costs. Consequentially, the application in encl 89 was also dismissed at the invitation of counsel for the defendants so that that enclosure would not continue to remain on file as pending matter.

Applications dismissed.

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Reported by Hanim Kamaruddin

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